United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

CASE NO: 75-1245

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Pl's.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Case No. 75-1245

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

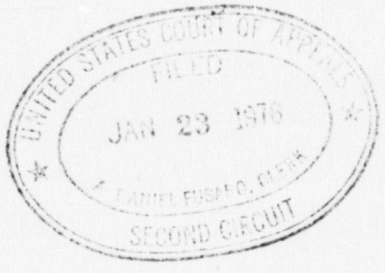
versus

ANTONIO BOPREGO VIDAL, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of New York

BRIEF OF DEFENDANT-APPELLANT, ANTONIO BORREGO VIDAL



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PRELIMINARY STATEMENT

The trial judge who rendered the decision appealed from is the Honorable Whitman Knapp.

ISSUES PRESENTED

I. DID THE TRIAL COURT ERR IN ADMITTING HEARSAY EVIDENCE AGAINST DEFENDANT VIDAL? IS THE HEARSAY NECESSARY TO SUSTAIN THE CONVICTION?

(Both questions answered in the affirmative.)

II. IS THE EVIDENCE SUFFICIENT TO SUSTAIN VIDAL'S CONVICTION ON THE SUBSTANTIVE OFFENSE OF POSSESSION WITH INTENT TO DISTRIBUTE WHERE THE GOVERNMENT FAILED TO PROVE THAT VIDAL EXERCISED DOMINION OR CONTROL OVER THE HEROIN IN THE JAGUAR?

(Answered in the negative.)

III. DID THE TRIAL COURT ERR IN ALLOWING EVIDENCE OF FOUR UNRELATED ARRESTS WHERE THE PROBATIVE VALUE OF THE EVIDENCE WAS OUTWEIGHED BY ITS PREJUDICIAL EFFECT?

(Answered in the affirmative.)

IV. DID THE TRIAL COURT ERR IN ADMITTING INTO EVIDENCE THE PAPER FOUND IN VIDAL'S WALLET WHICH CONTAINED THE ADDRESS AND PHONE NUMBER OF RUSAM AUTO SELLERS?

(Answered in the affirmative.)

V. DID THE TRIAL COURT ERR IN ADMITTING EVIDENCE OF THE MONEY FOUND IN A SAFE DEPOSIT BOX BELONGING TO VIDAL'S WIFE?

(Answered in the affirmative.)

STATEMENT OF THE CASE

A three count indictment against Defendant ANTONIO BORREGO VIDAL and other persons was filed on October 29, 1973 (A.14-18).[1/] Count one of the indictment charged that:

> From...the 1st day of November, 1968, and continuously...up to...the date of the filing of this indictment...Benjamin Rodriguez, a/k/a Benny One-Eye, Anthony Stanzione, Antonio Borrego Vidal, Manuel Uziel, Jose Rodriguez Baeza, William Sherman Terrell, a/k/a Goldfinger, Roch Orsini and John Doe, a/k/a "El Gallego", the Defendants, and Louis Gomez Ortega, Jean Orsini, a/k/a Jean Pierre Andre Huguen, and George Warren Perez...unlawfully, wilfully and knowingly...conspired... with each other to violate, prior to May 1, 1971, Section 1403 of Title 18, United States Code, Sections 173 and 174 of Title 21, United States Code, and Sections 4701, 4703, 4704, 4771, and 7237 of Title 26, United States Code, and, on and after May 1, 1971, to violate Sections 812, 828, 841(a)(1), 841(b)(1)(A), 843, 951, 952, 955, 959, and 960 of Title 21, United States Code (A.14).

The second count charged that:

> On or about the 19th day of September, 1971...Benjamin Rodriguez, a/k/a Benny One-Eye, Anthony Stanzione, Antonio Borrego Vidal, Manuel Uziel, Jose Rodriguez Baeza, William Sherman Terrell, a/k/a Goldfinger, Roch Orsini, and John Doe, a/k/a "El Gallego", the Defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute...516 grams of heroin hydrochloride (A.17).

1/ "A" will be used to refer to those portions of the record which have been reproduced in Appellant's Appendix. "TR" will be used to refer to those portions of the transcript of testimony which have not been reproduced in the Appendix.

The third count charged that:

> From on or about the first day of May, 1971, and continuously thereafter...Louis Gomez Ortega...unlawfully...did engage in a continuing criminal enterprise...which violations were a part of a continuing series of violations of said statutes undertaken in concert with at least five other persons with respect to whom Louis Gomez Ortega occupied a position of organizer, supervisor, and manager and from which continuing series of violations, he obtained substantial income and resources (A.18).

The trial of Defendants Rodriguez, Stanzione, Uziel, Baeza and Terrell began on November 13, 1973. Baeza's motion to dismiss count two was granted. On December 14, 1973, the jury found Defendant Baeza guilty of count one. Defendants Rodriguez and Terrell were found not guilty (A.3). The jury was unable to reach a verdict as to Defendants Stanzione and Uziel, and their motion for a mistrial was granted (A.4).

On May 6, 1974, a trial of Defendants Stanzione, Uziel, Vidal and Ortega began. The trial was the first for Defendants Vidal and Ortega, and the second for Defendants Stanzione and Uziel. Defendant Ortega's motion for judgment of acquittal as to count three (the only count of the indictment pertaining to him) was granted. After approximately three days of jury deliberations, Defendants Stanzione, Uziel and Vidal moved for a mistrial. Their motion was granted (A.7).

On May 1, 1975, another trial of Defendants Vidal and Uziel began. The trial was Vidal's second and Uziel's third (A.10). Defendant Vidal was found guilty of counts one

and two of the indictment. Defendant Uziel was found guilty of count one, and the jury did not reach a verdict on count two (A.11).

Defendant Vidal was sentenced to ten years on count one to run consecutively to a sentence imposed in the United States District Court for the Southern District of Florida, ten years on count two to run consecutively to the sentence imposed on count one, and three years special parol to commence upon the expiration of the term of imprisonment on count two. Execution of the sentence imposed on count two was suspended and Vidal was placed on probation for a period of five years to commence upon the expiration of the term of imprisonment imposed on count one (A.19). This appeal followed.

STATEMENT OF FACTS

TESTIMONY OF GEORGE PEREZ

George Warren Perez was the "star" witness for the prosecution.[2/] In 1958, Perez established a travel agency in New York City named Via World Wide Tours (A.24). Perez met Louis Ortega, who frequently used the name "Juan Plaza" (A.48), at the travel agency in the summer of 1967 (A.27). Ortega was introduced to Perez as a man whose principal business was drugs, specifically heroin and cocaine (A.27). Ortega became one of Perez' clients (A.28). Perez wrote tickets and exchanged money for Ortega during their relationship (A.76).

In September, 1967, Ortega told Perez that he wanted to travel to Europe to make a heroin connection (A.29-30). Ortega told Perez that he was taking $100,000 with him (A.31). Perez issued a ticket for Ortega from New York to Madrid (A.30).

Perez next saw Ortega in the spring of 1968 (A.38). Ortega told Perez that he had seen Defendant Vidal in Spain (A.66-67). Ortega told Perez that Vidal was an old friend

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2/ Perez had previously been convicted in the "Jaguar" heroin importation case and sentenced to seven years in prison. See United States v. Ortega, 471 F.2d 1350 (2nd Cir. 1972). The government entered into a bargain with Perez and agreed to recommend that his sentence be reduced to time served (two years) in return for his testimony in this and other cases (A.222-26).

of his from Cuba. Ortega also told Perez that Vidal had been hidden for three months in Barcelona, and that he had almost been arrested there (A.67).

Some time after this meeting, Ortega introduced Perez to Jose Centor at Perez' office (A.38-40). Centor sometimes went by the name of Raymond Mindaa (A.57). Ortega told Perez that Centor was his new contact in Europe and that he had just arrived with a fresh shipment of heroin (A.40). Ortega also introduced Perez to Jose Baeza, and told Perez that Baeza was going to help him distribute the heroin which Centor had brought in from Europe (A.41-42).

The next day Ortega and Centor came to Perez' office, and asked that Perez exchange $100,000 worth of small bills for $100 bills (A.40). Perez exchanged the bills (A.42), and gave the money to Ortega and Jose Baeza (A.43).

Approximately four weeks later, Ortega, Baeza and Centor came to Perez, and Ortega told Perez that a new shipment had arrived (A.43). Ortega gave Perez approximately $150,000 worth of small bills to change for larger denominations (A.44). After Perez changed this money, Ortega told him that he (Ortega) and Centor were preparing a new shipment (A.45).

In early 1969, Ortega told Perez that he had a new connection in San Antonio, Texas with a Mexican General named Suarez, and that Ortega planned to import heroin from Mexico into the United States (A.46). Ortega told Perez

that Baeza and Esther Sierra (Ortega's girlfriend, A.51) would help him in this venture (A.47). Perez issued tickets for Ortega on several occasions (A.47).

Ortega came to Perez after each of his trips with a briefcase containing large amounts of money in small denominations. Ortega would tell Perez that the trips had "come out all right," and that they had brought 30 or 40 kilos of heroin. Perez changed Ortega's money into $100 bills (A.55).

Ortega told Perez that he was taking Sierra on his trips to lessen suspicion, and indicated that Sierra would bring drugs back into the country (A.56). Sierra travelled to Europe with airplane tickets purchased from Perez (A.56,58, 60,65).

Jose Centor went to Europe on April 14, 1969 using the name "Raymond Mindaa" (A.65). Several weeks later, Ortega went to Perez' office, and Perez asked Ortega about Centor's trip. Ortega told Perez that Centor had taken approximately $250,000 to Europe, that the trip had "come out perfect," and that Ortega was expecting a large shipment (A.69).

On May 14, 1969, Ortega and Baeza went to Europe. Ortega told Perez that the purpose of the trip was to establish a new contact in Europe. Ortega told Perez that he was carrying a considerable quantity of money (A.69-72). When Ortega and Baeza returned from Europe, Ortega told Perez that they had a new group in Europe, and that the first shipment would arrive in four or five weeks. Ortega referred

to the new contact in Europe as "the Frenchman" (A.73).

Later, Ortega purchased some tickets from Perez, and told him that Baeza was taking from $250,000 to $300,000 to Europe to prepare a new shipment (A.74).

In the summer of 1969, Ortega introduced Perez to Antoine Muzzi (a/k/a Jean Surragato, A.412). Ortega told Perez that Muzzi was his new contact in Europe, that he was one of the best connections, and that they were going to receive large quantities of drugs (A.83). Ortega obtained an apartment for Muzzi on 82nd Street in North Bergen, New Jersey (A.83-84). Perez saw Muzzi, along with Ortega and Baeza, on several occasions later in 1969 (A.84). On one occasion, Ortega told Perez that the first shipment, approximately 70 kilos of heroin, had arrived, and Ortega brought Perez more than $200,000 to exchange (A.84). Ortega told Perez that the principal of Muzzi's group was Maurice Vandelli (A.86) (a/k/a Maurice Schoch, A.411).

On September 25, 1969, Ortega had Perez issue a round-trip ticket from New York to Geneva for Jose Baeza (A.76). Ortega told Perez that Baeza was taking more than $200,000 with him, and that the purpose of his trip was to prepare a new shipment (A.77). After Baeza returned from Europe, Ortega showed Perez a letter signed by a man named Maurice, one of the Frenchmen (A.78). In the letter Maurice told Ortega that Baeza's services were unsatisfactory because

Baeza had cried in front of the Frenchmen about his family in Cuba. The letter requested Ortega to disassociate himself from Baeza (A.79-80). Ortega gave Baeza a large amount of money, and Baeza went to Miami (A.81).

In early 1970, Ortega came to Perez' office with Defendant Vidal. Ortega told Perez, "This is the person who is going to substitute for Baeza. I have known him for many years from Cuba and besides he was with me in Spain" (A.81). Ortega told Perez that he and Vidal had been friends for many years (A.82).

Perez was introduced to Anthony Stanzione in March 1970 by Vincente Ortiz (A.95-96). Perez and Ortiz had been involved together in the narcotics business (A.96-99). Ortiz told Perez that he was free to talk in front of Stanzione. Ortiz asked Perez for help in leaving the country as he was under $100,000 bail which was about to be revoked (A.100). Perez agreed to help Ortiz (A.101). Ortega came to Perez' office that evening and Perez told Ortega that Ortiz and Stanzione had been there (A.102). Ortega knew Ortiz and Stanzione (A.103). Ortega told Perez that he and Vidal had just delivered a shipment to Stanzione which contained one kilo too many. Ortega told Perez to relay this information to Stanzione (A.103).

Perez saw Ortiz and Stanzione the following day. Perez gave Ortega's message to Stanzione (A.104). Stanzione told

Perez that he had already worked out the problem with Ortega (A.105). Perez assisted in the plans for Ortiz to leave the country, and Ortiz eventually went to Europe (A.105-112). Ortiz told Perez that he had made good connections, and that he could supply Perez with heroin. Ortiz also told Perez that if he had trouble with his buyer, he could contact Stanzione (A.113). When Perez returned to New York, he told Ortega about Ortiz, his contact in Europe (A.114).

Ortega brought Muzzi to Perez' office in the summer of 1970 (A.91). Ortega told Perez that they were expecting a large shipment (A.92). Approximately four or five weeks later, Ortega told Perez that 70 kilos of heroin had arrived in a Citroen car. The next day, Ortega brought Perez $300,000 to change (A.92). Ortega told Perez that the shipment had been delivered to Tony the Italian by Ortega, Vidal and another person known as El Gallego (A.92-93). Perez testified that Tony the Italian is Anthony Stanzione (A.95).

Perez testified that he first met Defendant Uziel in September of 1970 in his office. Uziel came to his office with Ortega and two fugitives named the Battle brothers. At Ortega's request, Perez made arrangements for the Battle brothers to flee the country and go to Europe. Ortega told Perez that when the Battle brothers arrived in Europe, they would make contacts in order to obtain drugs. They were going to send the drugs to Uziel, who in turn would deliver them to Ortega (A.132-37).

Perez was having financial difficulty in September and October of 1970. He had lost a lot of money in the stock market and in his margin account in Switzerland (A.116-17). Perez asked Ortega for $35,000. Ortega came to Perez' office with Vidal and offered to lend Perez the money. Ortega told Vidal to give Perez the money, and Vidal gave Perez $35,000 in $100 bills. Ortega told Perez that if he had any problem paying Ortega, he should pay back the money to Vidal (A.118).

In 1970, Perez attempted a heroin importation venture with a Spaniard named Alvarez, a General Mendez, who was a retired chief of the Air Force of Santo Domingo and Ortiz (A.114-15). Perez explained his plan to Ortega. Ortega told Perez that he did not want to know how the drug was going to be introduced, but that he would buy everything that Perez could supply (A.115-16).

In November of 1970, Perez attempted to make a connection with Ortiz and General Mendez. He was to deliver the heroin to Ortega, who planned to deliver it to Stanzione. Perez' attempt at this heroin transaction failed (A.118-21). Perez returned to New York in late December, and spoke to Ortega. Ortega told Perez that there was no problem as the Frenchman had just arrived and he was expecting a big shipment (A.122).

Only one shipment arrived between December of 1970 and January of 1971 (A.407-09). Perez presented two apparently

inconsistent stories of what happened at this point.

Perez testified that Ortega introduced him to Roch Orsini in December of 1970 at his office. Ortega came in one evening, and told Perez that he needed two tickets for two Frenchmen. Ortega also told Perez that he had $250,000 for him to change. Perez issued the tickets for the Orsini's and changed the $250,000 into $100 bills. Ortega told Perez that the shipment delivered by the Orsini's had been distributed to Stanzione by himself, Vidal and El Gallego (A.196-99).

The second version of this incident was as follows. Perez testified that in January of 1971, Ortega came to his office and told him that he had received the shipment. Ortega brought Perez approximately $250,000 to $300,000 to change (A.124-25). Ortega told Perez that the shipment was delivered to Stanzione by Ortega, Vidal and El Gallego. Perez testified that "at that moment Vidal was present" (A.125). Perez changed the money into $100 bills for Ortega (A.125).

Perez issued four airplane tickets from New York to Rome in the names of Claude Schoch, Denise Schoch, Vandelli and Capasso (a/k/a Marcel Surragato, A.412) for January 12, 1971 (A.125).

In the meantime, Perez was still attempting to bring in a heroin shipment with the help of Ortiz, Alvarez and Mendez (A.130). However, on January 18, 1971, Alvarez called Perez from Puerto Rico and told Perez that General Mendez had been

arrested with the heroin (A.131-32).

Perez spoke to Ortega shortly after General Mendez was arrested. Perez told Ortega that he was afraid, and Ortega told Perez that he could stay in his house in Belmar. Ortega told Perez that he would give him protection and whatever else he needed. Perez went to the house at Belmar and stayed there approximately four or five days. Ortega told Perez that the Frenchman had just left and that they had dismantled one or two cars. The Frenchman had left a double bottom from one of the cars. Ortega told Perez that he was going to use the double bottom to take money to Europe (A.146-47).

While he was in Belmar, Perez had dinner with Ortega (A.149). Ortega told Perez that he had made a profit of $485,000 on his January shipment after he paid Vidal and Gallego (A.150).

After he left Belmar, Perez went to live in Ortega's house on 82nd Street in North Bergen, New Jersey (A.150). Perez did not work at his office, as he was afraid he would be arrested (A.151-52).

In February of 1971, Perez met a man named Roberto Gonzalez. Perez, Ortega, Gonzalez and Uziel entered into an agreement to attempt to import liquid cocaine into the United States (A.153-54). Pursuant to this agreement, Perez and Uziel attempted to locate a place for a laboratory. Perez and Uziel located an appropriate site, a farm in

Pennsylvania with approximately 64 acres. Perez signed a contract for the purchase of the farm (A.158). The purchase of the Pennsylvania farm was never consummated, however, as another site for the laboratory, a summer house in East Hampton, was found (A.160). Uziel rented the house in East Hampton for the summer season (A.161).

About this same time, in the spring of 1971, Ortega asked Perez and Uziel to locate a garage with a large entrance. Ortega told Perez that the garage was needed as he expected a shipment of 100 kilos of heroin. The heroin would be hidden inside a racing car and the racing car would be shipped inside a truck. Ortega told Perez that the racing car had been registered at Watkins Glen and would be brought into the country by the Frenchman (A.164-66). Perez and Uziel located an appropriate garage in Newark, New Jersey, and Uziel signed a lease for the property (A.166-69).

Ortega and Perez wrote a letter to the Schoches telling them that a garage had been obtained. An answer to the letter was received, and the Frenchmen indicated they would arrive in mid-June (A.169). Perez rented a house in Teaneck, New Jersey for the Frenchmen (A.170-73). Ortega, and his common law wife, Caridad Curi, and Perez lived in the house in Teaneck from April until September of 1971 (A.173-74).

In June of 1971, Perez overheard a telephone conversation between Ortega and Stanzione. Ortega told Stanzione that he

was expecting the Frenchmen, and Stanzione indicated that he would be in town (A.174-76).

On July 17, 1971, Perez met Claude and Denise Schoch at the house in Belmar (A.177-79). Ortega was present, and he told Perez that the shipment was about to arrive. Ortega, Curi, Perez and the Schoches then went to the house in Teaneck (A.179). Denise Schoch told Ortega and Perez that the truck with the racing car would arrive that week on the Queen Elizabeth II. She told them that the car would contain 100 kilos (A.180).

The next morning, Ortega, Perez and the Schoches went to a house Denise Schoch had rented in Rockville Center on Long Island. They went to the house to check if Denise's car, a Fiat, had been inspected by U. S. Customs (A.180). The car had a false bottom which would be used to take money back to France (A.181). Claude Schoch examined the car and determined that it had not been inspected (A.181-82).

Ortega, Perez and the Schoches then went to the house in East Hampton. Perez stayed there from Sunday afternoon until Tuesday, the 20th of July. On Tuesday, Perez returned to the house in Teaneck. On Tuesday or Wednesday, Ortega, Perez and the Schoches went to inspect the garage in Newark, and Claude Schoch found it satisfactory (A.183-84). The four then went to the house on 82nd Street in North Bergen, New Jersey. Claude and Denise Schoch stayed there, and

Ortega and Perez went to Fort Lee, New Jersey (A.184).

Ortega told Perez that he was going to take money out of the bank. Perez stayed in the car and Ortega left the car with a big briefcase. When Ortega returned, he told Perez that he had half a million dollars. Ortega and Perez went to the house in North Bergen. Ortega, Perez and the Schoches counted half a million dollars in $100 bills at the kitchen table (A.184). Ortega sent Perez to buy masking tape and black enamel spray. When Perez returned, they began to wrap the money in packages of $30,000 or $40,000 in paper towels. They put masking tape on the money, put it back in the briefcase and returned to Teaneck. The Schoches left, and indicated they would return on Friday when the shipment was scheduled to arrive (A.185).

On Wednesday the 21st, Ortega and Perez went to Belmar. That evening, when they went to eat, Ortega told Perez that he was going to call Tony (A.187). Perez overheard the conversation between Ortega and Stanzione. Ortega told Stanzione that the Frenchmen had arrived, and Stanzione told Ortega that he would take everything they brought. Ortega told Stanzione that he would see him within the next two days (A.189).

That evening Ortega told Perez that he was going to call Vidal in Miami so that Vidal could come up and help (A.189). Ortega went out. When Ortega returned, he told

Perez that he had spoken to Vidal, and that he expected him Friday or Saturday (A.190).

On Thursday, Ortega and Perez bought six suitcases into which they intended to place the drugs (A.190-91).

On Friday, July 23, at approximately noon, the Schoches arrived and told Ortega and Perez that the truck had not been able to board the ship due to its measurements (A.191-92). Denise Schoch told Ortega and Perez that the next shipment would be in January or February of 1972, and that it would consist of 300 kilos brought in in a racing car scheduled to race in Sebring, Florida (A.192-93).

The Schoches left at around 4:00 p.m. Ortega told Perez that Vidal should have arrived, and that he was probably staying at the Holiday Inn in Little Ferry. Ortega told Perez to check and see whether Vidal had arrived at the hotel. Perez went to the Holiday Inn in Little Ferry, and found that a person named Antonio Vidal Borrego was registered there. Perez went to his room, but there was no one there. He left a note under the door that Vidal should come over to see Ortega (A.193).

Perez returned to the house in Teaneck. Ortega told him that he was going to contact Stanzione and explain that the shipment had not arrived. On Saturday, Vidal came to the house in Teaneck. He told Ortega that he had received the note. Perez testified that:

> Ortega explained to Vidal in front of me the problem which the Frenchmen had had. Vidal appeared to have some doubts so then he said to him, "Let's go to the garage so you can see the suitcases which I had prepared."
>
> Q. Who said it to him?
>
> A. Ortega said to Vidal.
>
> Q. What happened next?
>
> A. We went, the three of us, Ortega and I, to the garage. I opened it and the suitcases were there. Vidal said, "This isn't necessary, I believe you" but at that moment he asked Ortega for two suitcases which he gave him (A.194).

Uziel arrived at the house that evening. He sat down with Ortega and Perez at the dining room table and Ortega explained that although the Frenchmen had come, the racing car had not arrived (A.195).

The following Tuesday, Ortega told Perez that he was going to take the money back to the bank. Ortega and Perez went to the bank in Fort Lee. Perez waited in the car while Ortega went into the bank (A.195).

In August of 1971, Ortega told Perez that his friend, Edwin Torres, had told him that Orsini was looking for him. Ortega told Perez that Torres had told him that Orsini would return within four weeks. Ortega told Perez that he thought Orsini was coming in with a shipment (A.195-96). Ortega wrote a letter to Orsini (A.199-201).

On approximately September 17 or 18, Ortega's mother-in-law told Perez that Perez' wife had told her that there

had been a Frenchman in the office looking for Ortega and that he had left a note (A.201-202). Perez relayed this message to Ortega, and Ortega told him he thought Orsini had arrived with a shipment. That evening Uziel came to the house in Teaneck, and Ortega told him to get the note. Uziel obtained the note, and gave it to Ortega. The note contained the name and telephone number of the hotel where Orsini was staying, the hotel Alrae (A.202-03). Ortega, Perez and Uziel went to a phone booth to call Orsini. Perez called the hotel to try to confirm Orsini's room number, but the clerk would not give the room number over the telephone (A.204). Ortega, Perez and Uziel returned to the house in Teaneck.

Approximately 8:30 that evening, Ortega and Perez went to pick up Orsini at the Hotel Alrae (A.205-06). Orsini told Ortega and Perez that there was a Jaguar at Madison Square Garden containing 97 kilos of heroin. The three returned to the house in Teaneck. Ortega indicated that they should wait for Uziel. However Uziel did not return, and Ortega, Perez and Orsini decided to go and pick up the Jaquar (A.207). Orsini drove to New York in a 1971 Chevrolet Caprice, and went directly to the Madison Square Garden garage (A.208-209). There was a large crowd coming out of Madison Square Garden, and Ortega decided to wait. The three men went to a French restaurant. At the restaurant,

Ortega said that he was going to call Stanzione. Perez told him to wait until he had the merchandise before he called Stanzione (A.209).

After dinner, Ortega, Perez and Orsini returned to the Madison Square Garden garage. Ortega entered the garage, and Orsini and Perez stayed in the Caprice. Ortega came out of the garage in the Jaguar, and he told Perez to follow him to New Jersey. Perez followed Ortega, but Ortega's car stalled on 31st Street and 8th Avenue. The men tried to start the car. Approximately five minutes later, two persons came over to them and said they could start the car. One of the persons sat down in the car and the other began to fool with the motor. Several minutes later, 40 agents of the Bureau of Narcotics and Dangerous Drugs appeared and arrested Ortega, Perez and Orsini (A.210).

After his arrest on September 18, 1971, Perez was taken to the house of detention on West Street (A.211-212). Perez' bail was set on September 19 or 20 (A.212). After his bail was set, Perez had a conversation with Ortega. Ortega told Perez:

> You will have no problems if your bail is reduced, I will put it up...I have sent a message to Vidal so that he should come to New York so that he should withdraw the money that is in the bank in Fort Lee and whatever problem you have, he will resolve it. From now on he will be the one who will be in charge of everything (A.214).

Prior to this conversation, Ortega had told Perez that he had a safe deposit box at the Fort Lee Bank. Ortega had

told Perez that the box was in the name of Juan Plaza and Vidal (A.215).

In October of 1971, Perez' bail was reduced to $25,000 cash. The cash was posted for his release. Two days after he was released, Perez went to see Ortega in the Federal House of Detention at West Street. Ortega told Perez that Vidal had taken all of the money out of the bank, and that Ortega had put up the $25,000 bail (A.215-16). Ortega also told Perez to go to a safe deposit box in a bank in Hackensack, New Jersey which contained jewelry, to remove the jewelry, and to give the jewelry to Ortega's wife (A.215-16). Ortega told Perez that Vidal had his keys and papers, and that Perez should obtain the key to the Hackensack safety deposit box from Vidal. Approximately four days later, Vidal came to Perez' office. Vidal told Perez he had put up the money for his bail, and inquired whether Perez had the keys which he needed to get the jewelry. Perez told Vidal that he did not have the keys. Three or four days later, Vidal brought the keys to Perez. Perez went to the bank in Hackensack on November 17, 1971, took out the jewelry, made an inventory, and gave the jewelry to Ortega's wife (A.217-18, 220).

TESTIMONY OF CLAUDE SCHOCH

Claude Schoch trafficked in heroin between 1969 and 1972. He received the heroin from Albert Jaume, Joseph Patrisei and Jean Paul Ordioni (A.397). Patrisei, Jaume, Jean Paul Orsini and Schoch's brother, Maurice, worked closely with Schoch in bringing the narcotics to the United States in cars (A.399). When the cars were brought to the United States, members of Schoch's group would come to the United States. The members of his group were Jeannot Surragato, Marcel Surragato, Roch Orsini, Jean Orsini, and Nedo Pedri (A.401-402). Schoch's group received the people who came to the United States with the cars and the heroin, and unloaded the merchandise. The buyers gave them money, they put the money in cars, and the people who brought the cars over took the cars back to Europe (A.402-403).

The first shipment of heroin, 42 kilos, was sent to the United States in an Acccadian car between August and November of 1969 (A.405). The second shipment, which consisted of 40 kilos in a Fiat and 80 kilos in a Citroen, came to the United States between April and June of 1970 (A.404, 406). The third shipment, which consisted of 50 kilos in each of two Fiats, and 80 or 90 kilos in a Citroen, arrived in the United States between July and October of 1970 (A.406-407). The fourth shipment, consisting of 80 or 90 kilos in each of two Citroens, arrived in the United States between December of 1970 and January of 1971 (A.407-408). A fifth shipment

sent between March and May of 1971 did not arrive in the United States (A.408-409). The next shipment was the truck with the racing car. It contained 100 kilos, and was scheduled to arrive between June and July of 1971 (A.409-410). There was another shipment in 1972 and another in 1974 (A.410). The homes and garages where the cars were dismantled were located in Belmar, Lake Hopatchong, Teaneck, and North Bergen (A.413). Schoch identified Ortega as his buyer (A.413-14).

The truck containing the racing car was to be shipped from LeHavre to New York on the Queen Elizabeth II (A.414). Schoch and his sister, Denise, came to New York to receive this shipment (A.415). Schoch saw Ortega, his buyer, and Perez at the house in Belmar (A.417-18). Schoch informed Ortega that 100 kilos of heroin was about to arrive, and Ortega showed Schoch the garage he had rented to receive the truck (A.418).

Schoch made arrangements with Ortega for the payment of the money Ortega would owe for the shipment, $900,000 (A.420-421). Ortega went to get half of the money, $500,000, in New York (A.421). Schoch accompanied Ortega to New York, and they then returned to Belmar. Schoch, his sister, Denise, and Perez counted the money (A.422). The money was supposed to be placed in the racing car, and eventually returned to Europe (A.423-24). However, Schoch received a

letter that the racing car had not been shipped from LeHavre. The deal was cancelled and Schoch returned to Europe (A.424).

Between April and June of 1970, after the second shipment was completed, Schoch and Ortega made an "outing" before Schoch returned to France (A.428). Schoch, Ortega, Jeannot Surragato and Defendant Vidal went out together (A.428). The four went to a "house of appointment where there were women." They had a meal, they drank, and they went to bed with the women that were in the house (A.430). Schoch had heard of Vidal before from his brother and from Jeannot Surragato. They had told Schoch that they had met Vidal between September and November of 1969, and that they had given him shelter at Ortega's request (A.429).

Schoch testified that he was cooperating with the government in return for promises of leniency regarding charges pending against him and his sister, Denise (A.431-34).

TESTIMONY OF JOSEPHINE CORBISIERO

Josephine Corbisiero was a former employee of the First National Bank of Fort Lee, New Jersey (A.231). One of her duties was taking care of safe deposit boxes. Mrs. Corbisiero identified a photograph of Ortega, who she knew by the name of "Juan Plaza". Mrs. Corbisiero knew Plaza as he had come into the bank and opened two safe deposit boxes, box numbers 1433 and 1289 (A.232-36). Box 1433 was opened in the names

of Juan Plaza and Antonio Vidal (A.236-237). Mrs. Corbisiero did not know who had signed the name "Antonio Vidal" on the signature card (A.237). The records of the bank showed that an individual who identified himself as Juan Plaza visited box 1433 on July 12 and July 26 of 1971. The records also showed that an individual who identified himself as Antonio Vidal visited box 1433 on September 23, 1971. (A.237-240). Mrs. Corbisiero had never met Defendant Vidal, and was unable to testify that he was the person who visited box 1433 on September 23, 1971 (A.242). The government never established that Defendant Vidal had signed the signature card or access record to box 1433 (A.252-53).

TESTIMONY OF CANDIDO LAMIERA

Candido Lamiera was an employee of Via World Wide Tours, and he had been so employed in October of 1971 (A.245). He had a conversation with Laura Warren, Perez' wife. As a result of that conversation, Lamiera took a plane to Miami. He called a telephone number which Mrs. Warren had given him (A.245-46). He spoke with a man and told him "My name is Candy. I am here in Miami." Lamiera gave the unidentified man his address. That evening a man came to Lamiera and gave him a package (A.248). The government did not offer any proof as to the identity of the person with whom Lamiera had the telephone conversation, or any proof as to the identity of the person who gave him the

package (A.248). After Lamiera received the package, he returned to New York, and delivered the package to Mrs. Warren (A.251).

STANZIONE'S TAX RECORDS

The government sought to introduce tax returns and wage and tax statements filed by Anthony Stanzione to show that Stanzione worked at Rusam Auto Sellers from 1966 through January of 1971 (A.255-257, 259). The court ruled that the documents were admissible, and under compulsion of the court's ruling, counsel for Vidal stipulated that Stanzione worked at Rusam Auto Sellers from 1967 to at least the end of 1971 (A.257-262).

TESTIMONY OF CHARLES DODGE

Charles Dodge was a special agent with the Drug Enforcement Administration in West Palm Beach, Florida, and had been so employed for four and one-half years (A.263). Dodge arrested Defendant Vidal on August 3, 1973 (A.263-64). Vidal was searched as he was brought into the detention area of the jail (A.265). Vidal had a wallet containing various pieces of paper and business cards. Dodge took the wallet and the papers and gave them to another agent who was assisting him. Dodge asked the other agent to Xerox everything that was contained in the wallet (A.265). A few minutes later, the other agent brought back the wallet, the papers,

and some Xerox copies and gave these items to Dodge. Dodge examined the documents (A.268). The original documents were put back in the wallet, and given to Vidal. Dodge testified that he was able to identify the Xerox copies of the contents of Vidal's wallet because he had written down his name and the case number on the copies after the other agent brought them back from the Xerox room (A.266-67). Dodge was not present when the photocopies were made (A.267-68). He just directed one of his assistants to go to the machine and make the copies (A.268).

The trial court admitted the photocopies over Vidal's objection. One of the photocopies was a copy of a slip of paper on which was written "Rusam," along with an address in the Bronx and a telephone number (A.272). The government introduced two Bronx telephone books to show that the phone number for Rusam Auto Sellers which appeared on the slip of paper in Vidal's wallet was an old telephone number and that the number had been changed after 1971 (A.286).

TESTIMONY OF JEFFREY ONDA

Jeffrey Onda was employed as a front desk clerk and night auditor at the Holiday Inn in Little Ferry, New Jersey (A.275). Onda identified a record of the Holiday Inn which showed that a person named Antonio Vidal stayed at the Holiday Inn from July 25 to July 26 of 1971 (A.276-78). Onda did not know who actually occupied the room, or who provided the information

regarding the name appearing on the record (A.278).

TESTIMONY OF LOUIS FINKLEA

Louis Finklea was employed an as officer of the United States Immigration Service in Miami (A.279). On September 3, 1973, he was on duty at Miami International Airport (A.281). A person by the name of Joaquin Antonio Diaz Figueroa presented himself for inspection at Finklea's inspection booth and claimed that he was a citizen of the United States by reason of birth in Puerto Rico (A.281). The man presented a birth certificate to Finklea in the name of Joaquin Antonio Diaz Figueroa (A.281-82). Finklea was not convinced that the man was the person mentioned in the birth certificate, and proceeded to ask him questions about Puerto Rico. The man was unable to answer the questions to Finklea's satisfaction (A.283). Finklea referred the man to the secondary inspector and directed him to the waiting room. Finklea identified the man he detained that day as defendant Vidal (A.285).

TESTIMONY OF THOMAS PRITCHARD

Thomas Pritchard was employed with the United States Immigration and Naturalization Service as a supervisory immigration inspector (A.287). On September 3, 1973, he was assigned to Miami International Airport (A.287-88). Finklea referred the individual who had given his name as Joaquin Antonio Diaz Figueroa to Pritchard for secondary inspection (A.288-89). Pritchard interrogated the man, and his answers were unsatisfactory (A.289-92). Pritchard asked

the man to empty his pockets. One of the pockets contained $16,081 (A.292). Pritchard then referred the man to United States Customs, and recommended a personal search. The search was negative and Pritchard returned the man to the immigration area. Pritchard prepared the reports necessary to defer inspection to the District Office in Miami (A.293-94). However, the office was closed that day, and Pritchard turned the man over to the guard service so that he could be kept in custody until the next day (A.294-95). Mr. Pritchard was unable to identify the man he interviewed that day (A.296-97).

TESTIMONY OF EBRIAN GONZALEZ

Ebrian Gonzalez, the President of a security company named United States Guard Agency, was given custody of an individual giving the name of Joachin Antonio Diaz Figueroa in September of 1973 (A.298-99). Gonzalez took the man to his office in Miami. It was his responsibility to deliver him to the Central Office of Immigration in Miami on the following day (A.300). The man turned over $10,000 to Gonzalez for safe- keeping (A.302). That evening, Gonzalez took the man to an apartment in Miami (A.305). Sometime that evening the man broke the screen on the window and escaped (A.306-307). Gonzalez identified Defendant Vidal as the person he detained in September of 1973 (A.308-309).

TESTIMONY OF ROBERT ROSS

Robert Ross was employed as a special agent of the FBI in the fall of 1973 (A.312). In September of 1973, the United States Attorney's office directed him to locate Defendant Vidal (A.313). On December 22, 1973, Ross arrested Defendant Vidal at an apartment in Miami and advised him that he was under arrest on a bail jumping warrant issued out of the Southern District of Florida (A.315-16, 319).

TESTIMONY OF ORLANDO MOLLINEDO

Orlando Mollinedo was employed as a bank auditor by the Bank of Miami in 1972 (A.320). He identified a safe deposit box contract signed by a customer named Justa Hernandez, Defendant Vidal's wife (A.321-22). In November of 1972, the box was drilled open as the rent for the box had not been paid (A.324). The box contained $14,000 in $100 bills wrapped in a small shopping bag from a New York store (A.325). On December 1, 1972, Justa Hernandez came in to claim the money (A.325, 327). She identified herself, and the bank gave her the $14,000 (A.325). Mollinedo testified that Justa Hernandez was the only person who had access to the safe deposit box in Miami (A.326).

TESTIMONY OF JAMES STAFFORD

James Stafford was employed as an investigator by the New York Telephone Company (A.329). Stafford testified that

the phone number of a subscriber named Anthony Rizzo was 882-2992. The number was changed to 882-2445 (A.330-333).

TESTIMONY OF WILLIE PICKETT

Willie Pickett, an employee of the New Jersey Bell Telephone Company, identified telephone records belonging to an Anthony Stanzione. The records showed that Stanzione's phone number was 871-1791 and his place of employment was listed as Rusam Auto Sellers (A.334-340).

TESTIMONY OF THOMAS LUBY

Thomas Luby, the Atlantic Ticket Agent for the Cunard Steamship Company, identified some business records pertaining to a transatlantic crossing made by the Queen Elizabeth II in July of 1971 (A.340-31). The records showed that passage had been booked for a Mercedes Benz Truck which contained a racing car on a trip made by the Queen Elizabeth II from LeHavre to New York on July 16, 1971 (A.341-42). The records also showed that the truck could not be placed on board the ship due to its size and weight (A.343).

TESTIMONY OF SANDRA CASSELMAN

Sandra Casselman was a prostitute who had met Ortega in 1968 or 1969 in the New York brothel where she worked (A.344-46). Ortega visited Casselman once a week for a period of approximately five or six months to a year (A.346). Eva Levy was in charge of the brothel where Casselman worked (A.347-48).

Casselman testified that Stanzione came to Eva Levy's brothel with Ortega approximately four or five times in 1970 (A.375-76). Casselman also testified that she had seen Defendant Vidal at Eva Levy's brothel with Ortega (A.377-78). She did not testify when, or on how many occasions she had seen Vidal with Ortega. Casselman had failed to identify Vidal at Vidal's first trial (A.379).

TESTIMONY OF WASHINGTON WILKERSON

Washington Wilkerson, a resident of 3516 Bay Chester Avenue, the Bronx, identified his neighbor, Anthony Rizzo, as Anthony Stanzione (A.349-356).

TESTIMONY OF ARMANDO DeCARDENAS

Armando DeCardenas, a doctor practicing in New York, testified that Ortega was a patient of his (A.357-58). With the assistance of a prior photographic identification, Dr. testified that Defendant Vidal, another patient of his, had been introduced to him by Ortega (A.360-64).

TESTIMONY OF FRANK MATT

Frank Matt, a professional masseur at the Cataratet Hotel Spa in Ashbury Park, New Jersey, testified that Ortega was a regular patron of his during the summer of 1972 (A.365-66). Mr. Matt was unable to identify Defendant Vidal as one of the people who came to the spa with Ortega (A.369-71).

TESTIMONY OF RINALDO IRRIZARRY

Rinaldo Irrizarry, a United States Custom's Inspector, searched the Jaguar in the Queen Elizabeth II (TR.836-844).

THE SPANISH "RAP SHEET"

The government sought to introduce a Spanish "rap sheet" pertaining to Defendant Vidal (A.383-86). The court overruled objections to the admission of the document. However, rather than admitting the document into evidence, the court allowed a stipulation that Defendant Vidal was in Spain on the days indicated on the "rap sheet" (A.387-88), i.e., from at least March 6, 1968 to October 8, 1968 (A.435).

TESTIMONY OF MICHAEL PAVLICK

Michael A. Pavlick, a special agent with the Drug Enforcement Administration, testified about his surveillance activities in the "Jaguar" importation case in September of 1971 (TR.886-897). Pavlick testified that he did not see Defendant Vidal during his surveillance (A.393).

Pavlick also testified that in November of 1973, he went to the bank in Fort Lee, New Jersey and made inquiry concerning safe deposit box number 1233. He had the bank drill the box open, and found that it was empty (A.389-90).

Pavlick also testified that after Vidal's first trial, Sandra Casselman told him that she had recognized Defendant Vidal, although she had failed to identify him (A.390-92).

TESTIMONY OF STUART STROMFELD, MORTIMER MORIARTY AND JOSEPH QUAREQUIO

Another DEA Agent, Stuart Stromfeld, engaged in extensive surveillance activities in connection with the "Jaguar" case (TR.933-042). Stromfeld did not see Defendant Vidal during his surveillance (A.394).

Mortimer Moriarty, a special agent with the DEA, participated in the same surveillance activities (TR.944-957). Moriarty never saw Defendant Vidal (A.395).

Joseph Quarequio, Group Supervisor of the Unified Intelligence Division of the DEA, explained how the heroin had been found in the Jaguar (TR.961-965). The heroin found in the Jaguar was admitted into evidence (TR.973-975). Quarequio testified that Defendant Vidal was never mentioned anywhere in the original "Jaguar" file (A.396).

VIDAL'S POSSESSION OF CASH

It was stipulated and agreed that on five days between March 11, 1970 and October 18, 1971, Defendant Vidal gave a total of $110,791.11 to an individual in Miami, Florida (A.435-36).

TESTIMONY OF CLYDE VENABLE

Clyde Venable, an FBI agent, testified that he arrested Defendant Vidal on May 6, 1970, in Union City, New Jersey (A.436-37).

The government rested. Defendant Vidal's Rule 29 Motion for Directed Verdict or Judgment of Acquittal (TR.1061) was denied (TR.1066).

DEFENSE EVIDENCE

It was stipulated and agreed that if safe deposit box 1433 from the First National Bank of New Jersey was stuffed with money wrapped in the manner testified to by Perez, the box could not hold more than $300,000 (A.438-439). Defendant Vidal introduced a certified copy of a 1973 judgment of Dissolution of Marriage from Justa Hernandez (A.440). Defendant Vidal rested (A.440). Defendant Uziel testified that he never met Defendant Vidal before the trial of this case (A.441). The defense rested.

THE CHARGE TO THE JURY

The trial court indicated that the evidence presented an issue of single versus multiple conspiracy (A.448). To eliminate confusion, the trial court decided to contract the conspiracy alleged in the indictment, and to instruct the jury that before they could find the defendants guilty, they had to find that the defendants were involved in that portion of Ortega's activities which concerned the Schoches and the importation of heroin in automobiles (A.446,450). The Judge charged the jury:

> You will recollect that the evidence before you suggests that Louis Gomez Ortega and some of the others may have engaged in various illegal enterprises. Before either of these defendants on trial may be convicted, you must be satisfied beyond a reasonable doubt that he was associated with Ortega in a single, definable conspiracy.
>
> To simplify your task in this regard, I am going to pare down the question which is going to be

presented to you. I am going to direct you to confine yourselves exclusively to such part of Ortega's alleged activities as are concerned with the importation of heroin hidden in automobiles as generally described by the witness Schoch.

That activity started you will recollect with a shipment concealed in an Accadian -- I remember that I never heard it before -- and ended according to the government sometime after Ortega's capture with the Jaguar but in no event later than October of 1973.

I therefore charge you as a matter of law that you may not convict either of the defendants unless you are satisfied beyond a reasonable doubt that he was a wilful and knowing participant in that phase of the activities of Ortega and his alleged co-conspirators (A.454-55).

QUESTIONS FROM THE JURY

After deliberating for almost two hours, the jury asked the following questions:

"May we be supplied with the testimony of the date and reason of arrest relating to Vidal's illegal entry into Miami?

Also provide us with the dates and the reasons of arrests pertinent to this case."

Are there evidences of Vidal's presence in New York or New Jersey on dates of drug shipments from Europe (as stated in Mr. Beller's summation).

If so, may we have them? (A.456).

The trial court answered the jury's questions (A.458-465). The court erroneously told the jury that Agent Venable had arrested Vidal in North Bergen, New Jersey (A.459).

ARGUMENT

THE TRIAL COURT ERRED IN ADMITTING HEARSAY EVIDENCE AGAINST DEFENDANT VIDAL. VIDAL'S CONSPIRACY CONVICTION MUST BE REVERSED AS THE HEARSAY IS NECESSARY TO SUSTAIN THE CONVICTION.

The trial court admitted numerous hearsay statements against Defendant Vidal, for example:

1. In the Spring of 1968, Ortega told Perez that he had seen Vidal in Spain (A.66-67).

2. On at least four occasions, Ortega told Perez that Vidal and El Gallego had delivered shipments to Stanzione (A.92-3,103,125,150,196-99).

3. In July of 1971, when the racing car was about to arrive, Ortega told Perez that he was going to call Vidal in Miami so that Vidal could come up and help (A.189).

4. After Ortega and Perez were arrested, Ortega told Perez that Vidal would be in charge of everything, that Vidal would get the money from the Fort Lee Bank, and that Vidal would be in charge of everything (A.214).

5. Two days after Perez was released from prison on bail, Ortega told him that Vidal had taken all the money out of the bank (A.215-16).

Objections were made to the introduction of the hearsay (A.25-6,28-9,213; TR.105-114,335-38,1061).

The trial court erred in admitting the hearsay for three reasons.

A. The court erred in admitting the hearsay as the Government failed to show by a fair preponderance of non-hearsay evidence that Vidal was a party to the conspiracy.

It is well established that:

> [T]he trial court [is] required, before permitting the jury to consider hearsay declarations of one alleged conspirator as evidence against his alleged co-conspirator, to find by a fair preponderance of non-hearsay evidence that the latter was a party to the conspiracy [citations omitted]. Otherwise, a defendant could be convicted solely on the basis of hearsay evidence which he had had no opportunity to impeach or refute [citation omitted]. While the government's non-hearsay evidence against an alleged co-conspirator may be entirely circumstantial [citation omitted], mere association with persons engaged in a criminal enterprise or even presence at the scene of their crime will ordinarily not be enough. There must be some basis for inferring that the defendant knew about the enterprise and intended to participate in it or to make it succeed [citations omitted]. United States v. Cirillo, 499 F.2d 872, 883 (2nd Cir. 1974).

In the Cirillo case, inter alia, this Court reversed the convictions of two defendants on the grounds that there was insufficient non-hearsay evidence of their participation in the conspiracy to warrant introduction of hearsay statements made by alleged co-conspirators. In so doing, this Court stated:

> Unlike Lilienthal, Gutierrez was never heard to discuss narcotics with any of the conspirators...Nor was there any non-hearsay evidence of any participation by him in any purchase or sale. Clearly this proof was

> insufficient to permit the court to find by a fair preponderance that he had participated.
>
> While the two visits raised suspicion, suspicion is not enough.
>
> ***
>
> The non-hearsay evidence of Gaber's participation in the March transaction was even less persuasive than that with respect to Gutierrez...There was no showing that narcotics were ever discussed in Gaber's presence, Gaber did not act furtively or lie to the police when questioned. Nor did he commit any act suggesting that his association with Cesare was illicit in nature. Mere presence at a site where a narcotics sale has been planned, without some showing that the defendant knew of it, is not enough to satisfy the "fair preponderance" test [citations omitted]. Id. at 884, 886.

In this case, the non-hearsay evidence against Defendant Vidal was clearly insufficient to show by a fair preponderance that Vidal was a party to the conspiracy. In early 1970, Vidal accompanied Ortega on a trip to Perez' office (A.81). Vidal did not say anything.[3/] In October of 1970, Vidal again accompanied Ortega to Perez' office. The only purpose

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3/ Ortega told Perez that Vidal was the person who was going to substitute for Baeza. Ortega's hearsay statement is not binding on Vidal as:

> [S]ilence is commonly thought to lack probative value on the question of whether a person has expressed tacit agreement or disagreement with contemporaneous statements of others. United States v. Hale, _____U.S._____, 95 S.Ct. 2133, 2136 (1975).

of Ortega's visit was to lend money to Perez, who was in financial difficulty as he had lost money in the stock market and in his margin account in Switzerland (A.16-17,118). Vidal was seen with Ortega at Eva Levy's brothel in 1970 (A.377-78). Between April and June of 1970, Vidal went to a "house of appointment" with Ortega and Claude Schoche (A.430). Ortega referred Vidal to his physician, Dr. De Cardenas (A.360-64). on July 24, 1971, after Ortega and Perez had been informed by the Schoches that the shipment in the racing car would not arrive, Vidal came to the house in Teaneck and looked at some empty suitcases, two of which were given to him by Ortega (A.194). On September 23, 1971, several days after Perez, Ortega and Orsini had been arrested, Vidal went to the safe deposit box in the First National Bank of Fort Lee. (A.237-40). There is no direct evidence what was in the box, or what Vidal did in relation to the box.[4/] In approximately November of 1971, after Perez, Ortega and Orsini had been arrested, Vidal told Perez that he had put up the money for Perez' bail (A.217-18). Vidal also gave

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4/ The fact that Vidal may have taken money out of Ortega's safe deposit box to raise Perez' bail is not sufficient evidence to link Vidal to the conspiracy:

> [T]he mere fact that a person "receives, relieves comforts or assists" one who has been a member of an aborted or completed conspiracy does not make him a participant in the conspiracy or liable for substantive crimes commited during the pendency of the conspiracy [citations omitted]. United States v. Freeman, 498 F.2d 569, 575 (2nd Cir. 1974).

Perez a key to Ortega's safe deposit box in Hackensack which contained several pieces of jewelry (A.217-18). When Vidal was arrested on August 3, 1974, he had a slip of paper in his wallet on which was written an old phone number of Rusam Auto Sellers, Stanzione's place of business (A.272).

There was no non-hearsay evidence that Vidal intended to participate in the conspiracy or make it succeed. There was no non-hearsay evidence that Vidal was ever near narcotics or that he even discussed narcotics. The evidence shows mere association and is perfectly consistent with the conclusion that Vidal was merely Ortega's friend. As the Government failed to show by a fair preponderance of non-hearsay evidence that Vidal was a participant in the conspiracy, the trial court erred in admitting the hearsay. Vidal's conviction must be reversed as the hearsay is necessary to sustain the conviction.

B. The court erred in admitting narrative hearsay statements which were not made in furtherance of the conspiracy.

To be admissible against others than the declarant, hearsay declarations must be made in furtherance of the object of the conspiracy. They cannot be mere narrative declarations of past facts. United States v. Goodman, 129 F.2d 1009 (2nd Cir. 1942); United States v. Sansone, 206 F.2d 86 (2nd Cir. 1953); United States v. Pacelli, 491 F.2d 1108 (2nd Cir. 1974). The hearsay statements testified to by Perez in paragraphs 1, 2 and 5, supra, were clearly Ortega's narrative descriptions of past

events and were therefore inadmissible. The error in admitting the statements was harmful, as Ortega's statements about Vidal's deliveries to Stanzione was the only evidence which placed Vidal in proximity to drugs.

C. The court erred in admitting hearsay statements made after the conspiracy was terminated.

Hearsay statements made after a conspiracy terminates through failure are inadmissible. Krulewitch v. United States, 336 U.S. 440 (1949). The conspiracy in this case terminated in failure when Ortega, Perez and Orsini were arrested with the Jaguar. The posting of Perez' bail by Vidal was not a conspiratorial act. See Krulewitch, supra (attempt to conceal facts of crime not part of original conspiracy); and United States v. Freeman, supra at 575. In light of the scant amount of evidence against Defendant Vidal, the error was prejudicial. Therefore, the admission of those hearsay statements listed in paragraphs 4 and 5 was reversible error.

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN VIDAL'S CONVICTION ON THE SUBSTANTIVE OFFENSE OF POSSESSION WITH INTENT TO DISTRIBUTE WHERE THE GOVERNMENT FAILED TO SHOW THAT VIDAL EXERCISED DOMINION OR CONTROL OVER THE HEROIN IN THE JAGUAR.

Defendant Vidal was found guilty of count two of the indictment, possession with intent to distribute the heroin found in the Jaguar in September of 1971. The evidence is insufficient to sustain his conviction on this count as the government failed to show that Vidal exercised any dominion or control over this shipment.

It is well established that the government may prove constructive, rather than, actual possession of contraband. However, to sustain a conviction on the basis of constructive possession, the government must prove that the defendant exercised dominion and control over the contraband. United States v. Febre, 425 F.2d 107, 111 (2nd Cir. 1970); United States v. Hysohion, 448 F.2d 343, 347-48 (2nd Cir. 1971); United States v. Steward, 451 F.2d 1203, 1207 (2nd Cir. 1971).

In this case, there is no proof that Defendant Vidal exercised any dominion or control over the heroin in the Jaguar. The last time that Perez or Ortega saw or spoke to Vidal before their arrest was on July 24, 1971, in the house at Teaneck. There was no evidence that Vidal, Perez or Ortega knew that the Jaguar would be arriving in September

of 1971. Indeed, Claude Schoch told Ortega and Perez that the next shipment would consist of 300 kilos to be brought in a racing car in January or February of 1972 (A.192-93). Ortega and Perez did not learn that the Jaguar had come into the country until September 17 or 18 of 1971 (A.201-03). There is no evidence that Vidal was ever in the vicinity of the Jaguar, that he had anything to do with its importation, and or even that anyone told him of its arrival. There was a complete lack of proof that he exercised any degree of dominion or control over it at any time. This evidence is clearly insufficient to sustain Vidal's conviction of the substantive offense of possession with intent to distribute the heroin in the Jaguar.

THE TRIAL COURT ERRED IN ALLOWING EVIDENCE OF FOUR UNRELATED ARRESTS WHERE THE PROBATIVE VALUE OF THE EVIDENCE WAS OUTWEIGHED BY ITS PREJUDICIAL EFFECT.

On four occasions during Vidal's trial, the Government introduced testimony which suggested that Vidal was involved in criminal activity unrelated to the offenses charged in the indictment. First, witness Perez testified that Vidal was "almost arrested" in Spain in 1968 (A.67). Second, Agent Venable testified that he had arrested Vidal at Union City, New Jersey, on May 6, 1970 (A.636-7). Third, Immigration Examiner Finklea (A.279-286), Immigration Inspector Pritchard (A.287-297), and witness Gonzales (A.298-311) testified that in September, 1973 Vidal entered the United States on a Braniff flight from Panama to Miami, that he presented a false birth certificate, that he was found to be carrying $16,081.00 in cash, that he was detained for presentation the following day to the Immigration Office in Miami, and that he escaped from the custody of a private guard service. Fourth, Agent Ross testified that he arrested Vidal for bail-jumping in Miami on December 22, 1973 (A.315-319). The effect of the testimony concerning these four incidents was to convey to the jury that Vidal was a person deeply involved in criminal activity. The admission of this prejudicial evidence denied Vidal a fair trial.

Evidence of similar acts, including other crimes, is admissible when it is substantially relevant for a purpose

other than showing a defendant's criminal character or disposition. United States v. Deaton, 381 F.2d 114, 117 (2nd Cir. 1967). The application of this rule requires the trial judge to balance the probative value of the evidence against the possibility that the evidence will prejudice the defendant's chances to have the jury decide the issues upon the merits. Id. at 117.

In United States v. Bozza, 365 F.2d 206 (2nd Cir. 1966), this Court articulated certain specific factors which are to be balanced in order to determine the admissibility of "other-crimes" evidence. It is necessary to balance:

1. The "actual need" for the evidence in the light of (a) the issues being tried, and (b) the other evidence available to the prosecution; and

2. The convincingness of the evidence that the "other-crimes" were committed and that the accused was the actor; and

3. The strength or weakness of the "other-crimes" evidence in supporting the issue

against "the degree to which the jury will probably be roused by the evidence to overmastering hostility." United States v. Bozza, supra at 213, citing McCormick, Evidence §157, at 332 (1954).

In Deaton, Bozza, and other cases in which this Court has affirmed convictions notwithstanding the admission of "similar acts" or "other-crimes" evidence, this Court has found a compelling reason for the admission of the evidence.

On the other hand, this Court has not hesitated to condemn the use of "other-crimes" evidence which has no probative value. See, e.g., United States v. Tomaiolo, 249 F.2d 683 (2nd Cir. 1957), where this Court reversed Tomaiolo's conviction even though there was "an abundance of evidence" that he was guilty of bank robbery. Id. at 685. This case differs from Deaton and Bozza in that the probative value of the "other-crimes" evidence was far outweighed by its prejudicial effect.

There is an additional element which this Court has considered in reviewing cases where there has been "other-crimes" evidence, i.e., whether the "other-crimes" testimony was intentionally introduced by the Government or was the result of inadvertence. United States v. Stromberg, 268 F.2d 258 (2nd Cir. 1959). Although a defendant is no less prejudiced by testimony not induced by the prosecution than by testimony which is so induced, this Court has deemed it pertinent to consider whether the Government has been at fault. This suggests a prophylactic rule designed to discourage prosecutorial misconduct. This case is an appropriate one for application of that rule because the prosecutor was guilty of misconduct on each of the four occasions when "similar acts" or "other-crimes" evidence was introduced.

1. The testimony that Vidal had "almost been arrested" in Spain in 1968.

Perez, the Government's principal witness, testified that

he had a conversation with Ortega in the Spring of 1968 concerning a recent trip Ortega had made to Europe. Ortega related that while in Spain he met "Nico," who had been "hidden three months in Barcelona and...was almost arrested there" (A.66-67). In response to a further question by the prosecutor, Perez testified that "Nico" was Defendant Vidal (A.67). Strictly speaking, the reference to Vidal having been "almost arrested" in Spain in 1968 is not evidence of "other-crimes". However, it is evidence of "similar acts", i.e., the conduct for which he was "almost arrested" was illegal and therefore similar in a general sense to the criminal conduct alleged in the indictment. The effect of the testimony was to imply that Vidal was engaged in criminal activities in Spain and that he was a person of criminal dispostion. It is clear that the prejudice caused by this remark was not the result of prosecutorial inadvertence for two reasons. First, it must be assumed that the Government carefully prepared Perez, its star witness.[5/] Second, having elicited from Perez that "Nico" was "almost arrested" in Spain, the prosecutor drove the reference to Vidal home by having Perez testify that "Nico" was in fact Vidal.

5/ This is not merely an assumption. The prosecutor declared on the record that he had prepared a list of questions for Perez (A.297).

In considering the admissibility of this testimony, what is most important is that there is simply no probative value to weigh against its prejudicial effect. No doubt it was relevant to establish a long-standing relationship between Ortega and Vidal, but it was hardly necessary to insert the gratuitous reference to Vidal as having been "almost arrested". It would have been sufficient for the well-rehearsed Perez simply to testify that Ortega had told him that Ortega saw Vidal in Spain as early as 1968. Since the "almost arrested" reference could easily have been avoided, the conclusion is irresistible that the prosecution intended the testimony to prejudice Vidal's chances for having the jury consider his case on its merits.

2. Agent Venable's testimony that he arrested Vidal in Union City, New Jersey, on May 6, 1970.

FBI Agent Clyde Venable testified that he arrested Vidal on May 6, 1970 in Union City, New Jersey (A.436-37). Agent Venable did not testify why he arrested Vidal; the jury was left to speculate as to the reason for the arrest. This was not evidence of "other-crimes", but rather was evidence of a "similar act" (i.e., a criminal act) to the act charged in the indictment. As was the case with the testimony that Vidal was "almost arrested" in Spain, Agent Venable's testimony strongly suggested that Vidal was a criminal.

It is difficult to say what probative value is to be weighed against the prejudicial effect of this testimony. Defendant can only speculate what probative value the Government ascribed to the testimony. Perhaps it was intended to show that Vidal was in Union City, New Jersey on at least one day between April and June, 1970, when, according to Claude Schoch, a Government witness, a shipment of heroin came into the United States concealed in automobiles (A.406). However, since Schoch did not testify that the shipment came into New York, it is difficult to see how proof that Vidal was in the New York area at about the time the shipment arrived was even marginally relevant to the issues before the jury.

As is the case with the "almost arrested" in Spain testimony, it was unnecessary for the jury to know that Vidal was arrested on May 6, 1970. Instead of having Agent Venable testify that he arrested Vidal on May 6, 1970 in Union City, New Jersey, the Government could have had Mr. Venable testify that he had seen Vidal in Union City, New Jersey on May 6, 1970. Since defense counsel would not have probed the circumstances of that encounter, the testimony, thus edited, would have been unchallenged and would have served to make the Government's rather insignificant point that Vidal was in the New York area on May 6, 1970.

Since, according to Stromberg, supra, it is relevant to consider the prosecutor's motives, it is pertinent to

point out that the prosecutor stressed Agent Venable's arrest in his closing argument and even implied that the arrest was related to "doing" [using] dope"(TR.1290). This leads to the conclusion that the Government introduced the testimony of the 1970 arrest solely to prejudice the jury against Vidal.

3. The testimony that Vidal entered the United States at Miami on September 3, 1973 with a false passport, that he was detained in Miami, and that he escaped from custody.

The Government proved the September, 1973 incident by the following testimony:

1. Immigration examiner Finklea testified that Vidal entered the United States on a Braniff flight from Panama with a passport in the name of Joachin Antonio Diaz Figueroa on September 3, 1973, that Finklea became suspicious in questioning Vidal, and that Finklea referred Vidal to a secondary inspector (A.279-285);

2. Immigration inspector Pritchard testified that a primary inspector (presumably Finklea) referred Vidal to him, that Pritchard discovered that Vidal had $16,081 in his pocket and was expensively dressed, that he decided that Vidal should be held for a "continued inspection" at the Miami district office when it opened the following day, and that he placed Vidal in the custody of a private guard service employed by Braniff (A.287-297);

3. Ebrain Gonzalez testified that he was President of a private guard company employed by Braniff, that Vidal was placed in his custody, that Vidal gave him $10,000

> in $100 bills for safe-keeping, and that Vidal escaped from his custody (A.298-306).

This testimony was not only evidence of an arrest, but was evidence of a crime as well. It is a felony to personate another when applying for admission into the United States. 18 U.S.C. 1546. Therefore, this testimony was clearly "other-crimes" evidence and, as such, was prejudicial to Vidal. Moreover, it was evidence of an offense not shown to be related to the offenses charged in the indictment. There was never any suggestion that Vidal's entry into the United States at that time was an act in furtherance of the conspiracy charged.

Again, Defendant can only guess what probative value the Government ascribed to this evidence. In his final argument the prosecutor referred to "Mr. Vidal's unexplained possession of money" as:

> "evidence of his involvment in this conspiracy and evidence of his trafficking in narcotics. You have the right and the government asks you to make that inference and it is as plain as day" (A.443).

Thus, it appears that the Government's legitimate purpose in introducing evidence of Vidal's illegal entry to the country in 1973 was to establish that Vidal possessed a large quantity of money at that time. Indeed, the Court instructed the jury as follows:

> When a defendant is charged with a crime the commission of which would normally produce wealth, it is permissible for the Government to show that at or about the time of the crime's alleged commission the defendant was in possession of sub-

> stantial sums of money. The theory is that the jury should be allowed to consider the possibility that such money was the fruit of the crimes charged (TR.1463-69).

If this was the purpose for introduction of the evidence relating to the illegal entry in September, 1973, it would have been possible, as with the two incidents of "other-crimes" testimony discussed above, for the Government to prove its point without also proving Vidal's criminal behavior. Inspector Finklea could have testified merely that Vidal possessed $16,081.00 when he presented himself for a routine immigration inspection. Again, the unnecessary and prejudicial details of the evidence suggest a deliberate attempt by the Government to prejudice the jury against Vidal by testimony of crimes unrelated to those charged in the indictment.

4. Agent Ross's testimony that he arrested Vidal for bail-jumping in Miami on December 22, 1973.

FBI Agent Ross testified that he arrested Vidal on December 22, 1973 in Miami on a charge of bail-jumping. This is clearly "other-crimes" evidence. Bail-jumping is a federal offense. 18 U.S.C. 1350. Moreover, a showing that Vidal was on bail is necessarily a showing that he was awaiting trial on the criminal charge for which the bail was required. Therefore, the testimony about Vidal's arrest for bail-jumping served double duty as a device to suggest to the jury that Vidal was a person deeply involved in crime.

Once again, Defendant can only speculate about the Government's view of the relevance, if any, of the testimony to the issues being tried. The Court instructed the jury, that the flight of a defendant after a crime has been commited may tend to prove his consciousness of guilt of that crime (TR.1464). Bail-jumping is certainly a form of "flight," and may indicate consciousness of guilt of the offense for which bail was required. However, there was no showing at Vidal's trial that the bail was imposed in connection with the offenses charged in the indictment. Therefore, the evidence of bail-jumping has no probative value to be weighed against its obvious prejudicial effect. The trial court apparently recognized that the absence of evidence connecting the bail-jumping charge with the crimes charged presented difficulty and instructed the jury as follows:

> Of course, the mere fact that a man may fear prosecution by no means establishes that he is guilty. Confident in his own innocence he may still not wish to tangle with the Government.
>
> However, if you are satisfied that the flight related to fear of prosecution <u>for this crime</u>, you may consider that with all the other evidence in the case (TR. 1465) (emphasis supplied).

The trial judge, by this instruction, invited the jury to pile inference upon inference: i.e., to assume, first, that the bail-jumping showed consciousness of guilt, and, second, that the consciousness of guilt related to fear of prosecution for the offenses being tried. Admission of evidence which

requires such speculation in order to be relevant can hardly be justified in light of its clear prejudicial effect.

5. The cumulative effect of the references to criminal conduct unrelated to the charges contained in the indictment.

As stated above, Defendant contends that each of the four references to criminal conduct unrelated to the charges contained in the indictment was prejudicial. This Court need not decide whether any one of them, standing alone, warrants a reversal of Vidal's conviction. Reversal is required if the cumulative effect of these references was to persuade the jury that Vidal was a wicked person, and therefore: (1) that he probably was guilty as charged, or (2) that although he was innocent of the charges contained in the indictment, he ought nonetheless be in the penitentiary. It is, of course, impossible to say what impact the prejudicial testimony had on the jury, but it is clear from a question which the jury sent to the Court during its deliberations that the testimony about Vidal's arrests weighed in the jury's deliberations. After it had deliberated for almost two hours, the jury sent the Court a note with the following question:

> May we be supplied with the testimony of the date and reason of arrest relating to Vidal's illegal entry into Miami?
>
> Also, provide us with other dates and reasons of arrest pertinent to this case (A.456).

The Court responded to the jury's questions as follows:

> On May 6, 1970, he was arrested in North Bergen, New Jersey by FBI Agent Venable.[6/] No reason.
>
> ***
>
> On September 3, 1973, he was detained in Miami by Immigration authorities. As to the reason, you will remember the testimony of Immigration Agent Finklea that he became suspicious of Vidal's identity.
>
> ***
>
> On September 22, 1973, Agent Ross arrested Mr. Vidal in Miami. Again, no reason given to you (A.459-60).

These remarks by the trial judge confirm what Defendant asserted earlier in this brief, i.e., that the arrests by Agent Venable, Inspector Finklea and Agent Ross were never shown to be arrests

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6/ In fact, Vidal was arrested in Union City, New Jersey, not North Bergen, New Jersey (A.437). The Court was led into this error by the prosecutor during a conference in Chambers held to consider the jury's question:

> THE COURT: As to the dates of arrest, they are May 6, 1970, the arrest in New Jersey by FBI Agent Venable. No reason.
>
> MR. BELLER: That is correct. Could you say North Bergen, New Jersey because we have cities for everything else (A.457).

While this might have been merely a faulty recollection on the prosecutor's part, it was a useful lapse of memory. North Bergen was a significant location in the case because Ortega, who was unquestionably in the narcotics business, had a house in North Bergen where certain of the conspiratorial conversations took place (A.83).

for any of the charges specified in the indictment.

Objections to the introduction of this evidence were made (A.28,312-14; TR.366-70,878-79). But the sufficiency of these objections is questionable. If they are not, Defendant submits that the cumulative effect of the testimony concerning the four arrests constitutes plain error under Rule 52(b), Federal Rules of Criminal Procedure as the errors seriously affected the fairness and integrity of the proceedings. United States v. Atkinson, 297 U.S. 157, 158 (1936). The questions asked by the jury, infra, clearly mandate this conclusion. United States v. Readus, 367 F.2d 689 (6th Cir. 1966). In that case, Defendant failed to object to hearsay which was later the subject of a jury question. In reversing Defendant's conviction on that the grounds that introduction of the hearsay was plain error, the Court stated:

> The fact that the foreman of the jury asked this question...indicates to us rather clearly that the jury was troubled over what effect it should give to this hearsay evidence. The judge placed his stamp of approval on it, and it may have been the decisive point in influencing the jury... Under these circumstances, we feel constrained to hold that the admission of this hearsay was error...which should be noticed...under Rule 52(b).

See also Reisman v. United States, 409 F.2d 789 (9th Cir. 1969) (introduction of certain documentary evidence held plain error where jury requested instructions relevant to evidence be reread); and 8A Moore's Federal Practice 52-4 (1968)("The plain

error doctrine recognizes the need to mitigate in criminal cases the harsh effect of a rigid application of the adversary method of trial, whereby the attorney's conduct binds his client.").

The four references to Vidal's arrests were unnecessary, they were prejudicial, and they undoubtedly influenced the jury's verdict. It can hardly be said, with fair assurance, that the jury's judgment was not substantially swayed by the erroneous admission of the "other-crimes" testimony. Therefore, Vidal's conviction must be reversed and the case remanded for a new trial. Kotteakos v. United States, 328 U.S. 750, 765 (1946); United States, ex rel. Springle v. Follett, 435 F.2d 1380, 1384 (2nd Cir. 1970).

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE PAPER FOUND IN VIDAL'S WALLET WHICH CONTAINED THE ADDRESS AND PHONE NUMBER OF RUSAM AUTO SELLERS.

On August 3, 1974, Agent Dodge arrested Defendant Vidal (A.263). Dodge seized Vidal's wallet, which contained "various pieces of paper and business-type cards" (A.265). Dodge testified that these documents were "meaningless to our office in Miami" (TR.591). Yet he proceeded to photocopy the entire contents of Vidal's wallet (A.265-66). The Government sought to admit the photocopies, one of which was a copy of a slip of paper with the name "Rusam," an address on Jerome Avenue, the Bronx, and a phone number (A.273). This was the only non-hearsay evidence which in any way linked Defendant Vidal to Stanzione. It was admitted into evidence (A.272) over the specific objection of defense counsel that it violated Vidal's Fifth Amendment right against self-incrimination (A.259-62).

In Hill v. Philpott, 445 F.2d 144 (7th Cir. 1971), the Seventh Circuit held that the Fifth Amendment prohibits the seizure of "testimonial" material in an otherwise lawful search. This Court has declined to join the Seventh Circuit and has held that "the Fourth Amendment does not protect broadly against the seizure whose compulsory production would be forbidden by the Fifth." United States v. Scharfman, 448 F.2d 1352, 1355 (2nd Cir. 1971) [emphasis supplied]. But, in discussing the effect of the Fifth Amendment on the seizure of testimonial evidence, this Court has stated:

> "***the real evil aimed at by the Fourth Amendment is the search itself, that invasion of a man's privacy which consists in rummaging about among his effects to secure evidence against him..."***[T]he vice lies in the unlimited search. The reason why we shrink from allowing a personal diary to be the object of a search is that the entire diary must be read to discover where there are incriminating entries...Similarly the abhorrence generally felt with respect to "rummaging" through the contents of a desk to find an incriminating letter would not exist in the same measure if the letter were lying in plain view. The Hayden opinion stated that "in the case of 'mere evidence,' probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction" [citation omitted]. United States v. Bennett, 409 F.2d 888, 897 (2nd Cir. 1969).

In this case, Vidal's papers were not seized pursuant to a search warrant describing them with specificity. They were seized incident to Vidal's arrest. The papers were not incriminating on their face. The agent who seized the papers testified that they were meaningless to him and he had no reason to believe that they would aid the Government's case. Yet the agent proceeded to do precisely what this Court condemned in Bennett, i.e., rummage through all of Vidal's personal papers. This search of all of Vidal's personal effects, which the agent had no reason to believe were anything but innocuous, was overly broad. The introduction into evidence of the "testimonial" material contained on the slip of paper therefore violated Vidal's Fifth Amendment

rights. The error requires reversal as the paper was the only non-hearsay evidence which linked Defendant Vidal to Stanzione.

THE COURT ERRED IN ADMITTING EVIDENCE OF THE MONEY FOUND IN A SAFE DEPOSIT BOX BELONGING TO VIDAL'S WIFE.

The Government introduced evidence that in November of 1972, a safe deposit box in Miami belonging to Justa Hernandez, Vidal's wife, contained $14,000 in $100 bills wrapped in a shopping bag from a New York store (A.320-325). The money was claimed from the bank by Justa Hernandez (A.325,327). The evidence showed that Justa Hernandez was the only person who had access to the safe deposit box (A.326). There was no evidence that Vidal had anything to do with the money. Vidal was in fact divorced from his wife approximately a year later (A.440). The evidence was admitted over defense objection (A.322).

The trial court erred in admitting the evidence of Justa Hernandez' assets. Under Florida law, a married woman is fully empowered to take charge of, manage and control her separate property without the joinder or consent of her husband. Florida Statutes §708.08. Nor can the acts or admissions of a wife be admitted against her husband in the absence of specific proof of actual agency. Sternberger v. United States, 401 F.2d 1012, 1018 (Ct.Cl. 1968); 31A C.J.S. Evidence §363(a).

In this case, there was no evidence at all concerning any agency relation between Vidal and his wife. There was no allegation or proof that she was a co-conspirator. There was no allegation or proof that she was even living with him in 1972, and indeed, Vidal and his wife were divorced in 1973

(A.440). Without more, the evidence of his wife's separate monies, kept in a safe deposit box in Miami, should have been excluded.

The prosecution believed that the evidence was sufficiently important to require emphasis in closing argument:

> [Y]ou think to yourselves while Mr. Alter is summing up, you ask how it is that his wife...Justa Hernandez, had in her safe deposit box $14,000 in $100 in a wrapper from a New York store, New York. This is a family that lives in Florida and they put in evidence -- you saw the evidence in this case, a safe deposit box...(A.443).

Therefore the error in admitting it is sufficient to require reversal.

CONCLUSION

Wherefore, for the reasons stated above, Defendant Vidal respectfully submits that his judgment of conviction should be reversed. In the alternative, Defendant Vidal submits that he is entitled to a new trial.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed on this 21st day of January, 1976 to: DANIEL J. BELLER, ESQ., Assistant United States Attorney, Office of the U. S. Attorney, Federal Courthouse, Foley Square, New York City, New York.

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